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THE INTERNATIONAL LEGAL INFORMATION NETWORK  
(ILIN)—A PRACTICAL APPLICATION OF  
PERRITT'S *TORT LIABILITY, THE FIRST*  
*AMENDMENT, AND EQUAL*  
*ACCESS TO ELECTRONIC NETWORKS\**

KATHLEEN PRICE†

I. INTRODUCTION

GOVERNMENTS and international governmental organizations (IGOs) that agree to participate in an International Legal Information Network<sup>1</sup> (ILIN) will, for the first time, allow the international public access to databases initially created to serve entirely internal needs. This access, until recently unanticipated, raises a number of novel legal issues. Resolution of these issues is difficult; the rights and duties of providers and users are determined by a complex mix of international conventions, na-

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\* Henry H. Perritt, Jr., 5 HARV. J. L. & TECH. 65 (Spring 1992).

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1. The ILIN is a computer-based mix of commercial and government produced legal databases. The term International Legal Information Network (ILIN) is used by the Library in two very different senses, to refer to:

1) A collection of existing legal databases, such as LEXIS, WESTLAW, SWISSLAW, CELEX, Italgure and the WLI, which are available to individual foreign legal specialists and reference librarians in the performance of their work for Congress, the courts, executive agencies and the public; and  
2) An international cooperative of legislative indexers and abstracters growing out of the World Law Index acting under the control and direction of the Library and using its English language thesaurus.

Currently, only the WLI is freely accessible in the Library's Reading Room, but the imminent introduction of a local area network as well as the pending plans to mount the Reading Room databases on the Internet will necessitate the review and renegotiation of existing contracts with data providers to ascertain whether databases made available on government-to-government exchanges or on limited site licenses may be opened to a larger audience. Arguably, as these databases are made available, the Library serves as a mere conduit, a mere distributor of information.

tional information policies and intellectual property regimes. Further complicating the inquiry is the fact that, unlike commercial database providers, IGOs may lack ability to obtain the protection of contractual disclaimers.<sup>2</sup>

The following example illustrates the complexity of the inquiry. The Law Library of Congress (Library) maintains and is expanding a *World Law Index: Part I, Hispanic Law* (WLI). This twenty year old on-line service is an English language guide to the official gazettes of Latin America, Spain, Portugal and their former colonies, Haiti and eight francophone African nations as of 1993.<sup>3</sup> Two foreign partners, the Mexican parliament and a Brazilian court of appeals, scan their respective gazettes and transmit the electronic images over the Internet to the Library.<sup>4</sup> The data will continue to be maintained by the Library.

Staff from partner institutions trained in indexing and abstracting at the Library in November, 1992 and will be taking over Spanish and Portuguese indexing and abstracting.<sup>5</sup> Staff from the partner institutions are also translating the thesaurus from English into Spanish and Portuguese. The thesaurus is based on subject headings created by the Library and is supplemented by terms from the Congressional Research Service's Legislative Indexing Vocabulary (LIV).<sup>6</sup>

As long as the Library retained sole control over the contents of the WLI database and allowed only onsite access to its own staff, the Pan American Health Association and other IGOs, the Library had no particular legal concerns. However, as the Library expands the WLI to include data generated by third parties and begins to make that data available to the general public, several legal issues arise.

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2. Database vendors know who their clients are and contract with them for payment, for respect for intellectual property and to be held harmless for error. They can limit their clientele to lawyers who understand the nature of the specialized language and concepts. Government providers may be precluded from limiting access: once their databases are mounted on the Internet, they are available to all without restriction. Any attempt to communicate with an unknown audience, both lawyers and lay, must be part of the display.

3. See Rubens Medina, *Project Description: International Legal Information Network—ILIN* (Apr. 16, 1992) (describing expansion of ILIN to include information received over Internet) (unpublished memorandum on file with the Villanova Law Review).

4. *Id.*

5. *Id.*

6. The Legislative Indexing Vocabulary is composed of Library of Congress subject headings supplemented by the Congressional Research Services Vocabulary for the Digest of General Bills and untranslatable foreign law concepts.

These issues fall into two categories: (1) those involving liability arising from the dissemination of inaccurate or inherently harmful information,<sup>7</sup> and (2) those involving liability arising from the infringement of the intellectual property rights of the authors of the disseminated information.<sup>8</sup> Each category can be subdivided with reference to the degree of control the Library asserts over the content of and access to the information—the distribution of which gives rise to the potential liability.<sup>9</sup>

7. Although there is a distinction between a cause of action arising from the negligent provision of inaccurate information and the cause of action arising from, for example, the dissemination of defamatory material, both share a common element—the invasion of a legal right by the content (the message) of the disseminated information. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164-68, § 111, at 771-85 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS]

8. This class of legal issues can be distinguished from the first in that an invasion of an author's intellectual property rights can occur without regard to the inherent meaning of the material. See 17 U.S.C. § 106 (1988) (listing exclusive rights belonging to owner of copyright). Governments and IGOs vary in the protection they afford to government documents such as official gazettes. See Law Library of Congress, *Copyright in Government Publications in Various Countries* (June, 1992) (unpublished manuscript on file with the Villanova Law Review). Most common law countries claim "crown copyright" in government works. *Id.* In contrast, the United States does not allow government works to be copyrighted. 17 U.S.C. § 105 (withholding copyright for government works). The European Community has proposed a *sui generis* right against unfair extraction for commercial purposes even when underlying data is not copyrightable. See Commission of the European Communities, *Proposal For A Council Directive on the Legal Protection of Databases* 67 (1992) [hereinafter Proposed Directive].

9. This Article focuses on this content and access control dynamic and how it shapes the inquiry into the Library's potential liability. This is a complex inquiry because neither content nor access control is an all or nothing proposition. The following questions illustrate the difficulty:

- (1) Is the Library protected for omissions or incorrect indexing by its satellites?
- (2) Does it matter whether those who provide information to the Library are partners, joint venturers or independent contractors?
- (3) What if a private university or commercial enterprise joined the indexing and abstracting team?
- (4) Should the Library refuse to commingle data?
- (5) Should each search first result in a screen disclaiming any guarantees as to accuracy and currency of data?
- (6) Can the Library legally exclude other institutions from using its public domain thesaurus?
- (7) Does the Library have to allow access to its databases to all comers if it mounts them on the Internet?

After factoring in intellectual property concerns, additional illustrative questions arise:

- (8) If the Library receives data in electronic format, stores and delivers documents contributed by a copyright claiming jurisdiction, is it infringing? Does the contributed data enter the public domain in the United States? Does it matter whether the receiver is Congress, a government agency or the public?
- (9) Does data contributed by the Library to a foreign database become copyrightable? Is it protected in the European Community?

Originally, the Library was not concerned with the legal issues involved in the WLI project. First, the Library assumed it was protected by sovereign immunity.<sup>10</sup> Second, as long as the Library worked with an international group of government agencies aware of the limited resources associated with constituent products and engaged in a common mission—government lawyers supplying information to government lawyers—it could protect itself through contract or seek an international treaty and administrative mechanism under the sponsorship of an international organization like UNESCO. However, plans to make the WLI database available to the public over the Internet forced a reevaluation.

Concurrently, a nascent literature on the legal implications of networking was growing. Henry H. Perritt's publication, *Tort Liability, The First Amendment, and Equal Access*,<sup>11</sup> provides a framework in which to address the Library's growing concerns. "[A]rticulating three goals for digital electronic network policy: encouraging a diversity of information products; preventing suppliers of information content from being foreclosed from access to markets; and allowing persons suffering legal injury because of information content to obtain compensation," Perritt concluded that analogies to traditional common law doctrine are more appropriate than *sui generis* approaches to dealing with emerging technologies.<sup>12</sup> As the questions posed above grew out of my participation in the Villanova Law School symposium and built upon Professor Perritt's recent article, I would like to use Perritt's framework to analyze the Library's very real concerns.<sup>13</sup>

(10) Whose law governs—that of the sending country, receiver, or any jurisdiction along the Internet?

(11) Can the Library joint venture with a commercial vendor in order to move into new jurisdictions beyond its appropriations? Can it allow its joint venturers a period of exclusive access and distribution rights?

10. Governments traditionally insulate themselves from suit under the doctrine of sovereign immunity. See, e.g., Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988). Sovereign immunity is likely to protect the Library from liability flowing from the preparation and dissemination of data created to assist the policy and planning activities of the legislative and executive branches. See 28 U.S.C. § 2680(a) (1988).

11. Henry H. Perritt, Jr., *Tort Liability, The First Amendment, and Equal Access*, 5 HARV. J.L. & TECH. 65 (Spring 1992).

12. *Id.* at 151 (concluding that "existing legal doctrine works reasonably well to promote three goals).

13. Complicating the inquiry is the generally-held assumption that information created by government employees and paid for with appropriated funds should be freely available to the public. This philosophy underlies the Depository Libraries program, 44 U.S.C. § 19 (1988), and has been used by both library and information industry/publishers associations as a limitation on the

This Article is divided into three sections. Section II applies Perritt's framework to the two roles the Library is likely to play. First, the Library may act as a "mere conduit" for information generated by others. Second, the Library may "publish" its own information. Section III focuses on the narrower question of when the Library might be held liable in a malpractice action. Section IV focuses on how current, and anticipated, intellectual property protection schemes impact upon the Library's role as a conduit and publisher.

This Article raises more issues than it answers and by doing so is meant to stimulate further inquiry into the nuances presented by each issue. Congress should consider each of the identified issues as it debates the future of the Library and the Library's role in the expanding information infrastructure. Consequently, this Article is a starting point for discussions with the international fraternity of legislative indexers, the federal information policy community and Congress.

## II. EMERGING TECHNOLOGIES AND THE LIBRARY'S ROLE

It seems clear that when the Library acts as a conduit for information prepared by others, rather than as a quality controller, it has limited liability for omissions or misinformation in contributed data.<sup>14</sup> Generally, under existing legal principles, mere conduits, transmitters, are not liable for the harm that flows from the transmission of the information.<sup>15</sup>

Conversely, if the Library and its partners exercise content control over the information available over the Internet they may be held liable for the transmission of inaccurate or harmful material. Under Perritt's analysis, the decision to exercise control may well bring with it tort liability.<sup>16</sup> If the Library exercises content

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Library's proposed fee for services authority. Consequently, I assume up front that once the "raw" data is made available to the public, database vendors have equal access rights. Thus, being obligated to make this data available, the Library should not be responsible when others "pass off" their product as a product of the Library.

14. Constitutional guarantees of free speech and press preclude imposing strict liability on distributors for contents of the materials they carry. *See Smith v. California*, 361 U.S. 147 (1959) (holding bookseller not liable for possession of obscene material). The same principles were applied in the electronic environment in *Cubby v. Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that it was infeasible for electronic information conduit to examine every publication).

15. Perritt, *supra* note 11, at 106-08 (applying existing principles of tort law to transmission of defamatory materials over network).

16. *Id.* at 103 n.195 (discussing interplay between sections 578, 581, 602

control it has reason to know of inaccuracies in, or harmful content of, the information it makes available over the Internet.<sup>17</sup> This knowledge can establish the scienter necessary to support a tort claim against the Library. In short, the Library becomes a "publisher." Publishers enjoy editorial control and First Amendment protection, but do not have tort immunity.<sup>18</sup>

The Library has a third option that is generally unavailable to private sector participants on the Internet. The Library can seek an international compact on public policy grounds if the exposure to tort liability is deemed to be too high, perhaps under UNESCO sponsorship, which would provide the equivalent of international sovereign immunity. In exchange for tort immunity, the Library would agree to make its databases available to the international public.

In all events, once the WLI becomes available over the Internet, the Library will never be solely a conduit nor solely a publisher. The Library is a "retailer/publisher" of the indexing and abstracting that it creates and a "wholesaler/conduit" of information provided by its partners. If the Library wishes to maintain this bifurcated approach, it needs to consider whether retail and wholesale information should be somehow segregated. Should the two types of information be 1) kept in separate bundles; 2) kept in the mainframe where it is accessible to the general public; or 3) stored in a manner where it is available only to the Library's foreign lawyers in conjunction with their work for government?

The retail/wholesale distinction can be sharpened by identifying which of Perritt's ten types of value-adding activities the Library wishes to perform.<sup>19</sup> When it creates the information

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and 603 of RESTATEMENT (SECOND) OF TORTS and resulting distinction between acting as publisher and acting as mere conduit).

17. Even as a publisher, the Library may not be liable for negligence. Although it may have a duty to provide accurate information, where omissions or mistakes are not obvious on their face and the burden of discovering them would be unreasonable under a "risk utility balancing test," at least one court would not find liability, especially if a danger existed that the Library would not act at all rather than risk untoward liability. See *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992) (applying risk-utility analysis to issue of negligent publishing); see also Brian Cullen, Note, *Putting a 'Chill' on Contract Murder: Braun v. Soldier of Fortune and Tort Liability for Negligent Publishing*, 38 VILL. L. REV. 625 (1993). For a further discussion of malpractice liability, see *infra* notes 23-33 and accompanying text.

18. Perritt, *supra* note 11, at 103 n.195.

19. *Id.* at 68-69. Perritt identifies the following ten value adding activities: (1) authorship, (2) chunking and tagging, (3) adding internal pointers, (4) adding external pointers, (5) presentation, (6) duplication, (7) distribution, (8) promotion, (9) billing and (10) integrity assurance. *Id.*

product, the Library provides all ten types of activities except duplication, distribution and billing (for which the Library's Photoduplication Service has statutory authorization).<sup>20</sup> When the Library adds information generated by its partners, to avoid tort liability, the Library must reexamine plans to provide internal pointers, duplication, distribution, promotion, billing and quality assurance. These value adding activities require content control, which creates potential tort liability.<sup>21</sup> For the same reason, the Library should probably not assume responsibility for providing a broadly or narrowly defined directory, help screens or other aids; it should encourage cooperative participation in providing such services. Finally, the Library should segregate contributed indexing and abstracting from products prepared in house and stored on the mainframe.<sup>22</sup>

### III. MALPRACTICE

This Section focuses upon how tort liability would arise in connection with the use by the public of an index and abstract incorporated in the WLI. Tortious conduct on the part of the Library and its partners is most likely to be covered by the rubrics of professional malpractice or misrepresentation.<sup>23</sup> Its foreign

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20. 2 U.S.C. § 150 (1988).

21. For a discussion of how content control creates potential tort liability, see *supra* notes 16-18 and accompanying text.

22. Initial planning called for storage of all data in a merged database at the Library. A pilot research project currently under development would obviate the necessity for such storage. See Robert E. Kahn, *Deposit Registration and Recordation in an Electronic Copyright Management System* 7, 19 (Aug. 1992) (unpublished manuscript on file with the *Villanova Law Review*). By use of a unique electronic signature the Copyright Office will be able to verify that an electronically registered deposit stored in a distributed repository, either at a user's local site or commercially, has not been altered. *Id.* at 4. As currently conceived, participants would link electronic bibliographic records to stored documents. *Id.* at 6. This system both guarantees preservation and payment of authors' rights. *Id.* at 10. The Copyright Office would operate the Rights Management System and the Library of Congress or National Archives might store critical information as a backup. *Id.*

23. PROSSER & KEETON ON TORTS, *supra* note 7, § 105, at 725 (discussing tort of misrepresentation), § 32, at 185-93 (discussing modification of reasonable person standard in case of professional).

The possibility for errors grows as the WLI expands. For example, the Hispanic Law Division had begun the training of Mexican and Brazilian participants when it first became aware that unforeseen difficulties had arisen. In the design of Spanish and Portuguese parallel thesauri, the three lawyers in the Division discovered that their foreign colleagues each used terms differently. Despite the common civil law roots of their legal systems, the law has evolved differently in these two jurisdictions. Thus, it became apparent that a number of thesauri would be needed even for Spanish and Portuguese.



lawyers are expected to use reasonable care in light of their superior learning, experience, and special skills, knowledge or training. However, they do not warrant information conveyed and should incur no liability for an honest mistake of judgment, knowledge or care ordinarily possessed and employed by members of the profession in good standing.<sup>24</sup>

Negligence law does require that a reasonable person anticipate and guard against the negligent conduct of others.<sup>25</sup> One can expect a lawyer to check legal information received from automated sources; indeed, lawyers complain that the existence of WESTLAW and LEXIS has added to their research burden because good practice entails checking both.<sup>26</sup>

Does a lay person have a similar responsibility? Is the Library protected under the ideas of contributory negligence if the information user fails to independently verify the electronic information?<sup>27</sup> Traditionally, statements of foreign law have been held to constitute representations of fact upon which a plaintiff may rely,<sup>28</sup> evidently on the theory that courts will not take judicial notice of foreign law—it must be proved as a fact.<sup>29</sup> This would

24. PROSSER & KEETON ON TORTS, *supra* note 7, § 32, at 186-87.

25. *Id.* § 33, at 197.

26. See, e.g., Laura A. O'Connell, *Legal Malpractice: Does the Lawyer Have a Duty to Use Computerized Research*, 35 FED. INS. COUNS. Q. 77 (1984) (stating lawyers have duty to use LEXIS or WESTLAW). For a somewhat dated argument that such a requirement benefits the "haves" of the profession, see Steven A. Childress, *Warning Label for LEXIS: The Hazards of Computer-Assisted Research to the Legal Profession*, 13 LINCOLN L. REV. 91, 93 (1982) ("Until time and technology lower costs and broaden access, the computer miracle will benefit a narrow band of members of the legal profession.").

27. One court has imposed liability upon a third party who relied upon information prepared by a government agency. In *Brocklesby et al. v. Jeppesen*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986), the United States Court of Appeals for the Ninth Circuit upheld a trial court's holding that the defendant Jeppesen was liable under a theory of strict liability for errors in graphical instrument approach charts. *Id.* at 1295. The appellate court held that the charts were products and therefore within the theory of strict liability under California law. *Id.* at 1294-95. The court then rejected Jeppesen's argument that it should not be held strictly liable because it relied upon information prepared by the government. *Id.* at 1296. The court also upheld a finding of liability based upon negligence, stating that Jeppesen "can be held liable for negligently failing to detect the defect in the product it marketed." *Id.* at 1297.

28. *Bethell v. Bethell*, 92 Ind. 318, 324 (1883). In *Bethell* the court stated: Where one of two contracting parties represents that he knows the law of a foreign State, and this representation is acted upon by the other, the plainest principles of natural justice require that he who made the representation should be deemed guilty of fraud if he misleads the person with whom he is dealing by a false statement of foreign law.

*Id.*

29. *Id.*

appear to implicate both law and non-law trained indexers and abstracters who are transforming Spanish, Portuguese and French into English. Current practice provides cursory guideposts to the vernacular language gazettes that should serve as a defense to liability. A warning screen that English entries must be used in conjunction with original texts would represent good practice.

The Library's potential problems increase when its activities involve more exotic jurisdictions, such as those in the Arabic speaking world where lack of availability of underlying legal texts and inability to deal with the language would make a database particularly useful.<sup>30</sup> Currently lacking an Arabic foreign legal specialist, the Library is considering relying upon contributions from Harvard Law School, its Egyptian Field Office, in-country research institutes or government agencies. That these sources must be relied upon without the benefit of knowledgeable senior staff to provide oversight is cause for concern.

In contrast, the Library bears little practical risk of liability either as a conduit for other's information or for its own activities that provide guideposts to its collections of official gazettes similar to the card catalog's pointing to a book collection.<sup>31</sup> Libraries have never been held as guarantors of their collections, and the public appears to understand the ethical obligation libraries assume to represent all viewpoints.<sup>32</sup> This is consistent with Per-

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30. While Islamic law principles prevalent in many of these jurisdictions would appear to provide commonality, different schools of Islam, mixed civil law and religious systems, and secular artifices used to get around religious prohibitions have introduced differences into the law, which provide thesaurus problems. In addition, to be truly useful to a non-Arabic-speaking audience, abstracts should be so complete as to obviate the need to consult the original.

31. See Perritt, *supra* note 11, at 103 (linking potential for liability with activities in which person is engaged).

32. Despite the fears of "librarians malpractice" rampant in the 1970s, cases do not exist, either because public expectations exempted libraries or because of the notorious empty pockets of practitioners and their employees or because of the prominent role of governments as providers of library services. Various studies of reference services going back twenty years have indicated that patrons receive correct information only about 55% of the time. See Robert Burgin & Paul Hansel, *Reference Accuracy: Improving our Chances*, 65 WILSON LIBR. BULL. 66 (1990); see also Kenneth D. Crews, *The Accuracy of Reference Service: Variables for Research and Implementation*, 10 LIBR. AND INFO. SCI. RES. 331 (1988); Joan C. Durrance, *Reference Success: Does the 55 Percent Rule Tell the Whole Story?* 114 LIBR. J. 31-36 (1989); *The Continuing Debate on Library Reference Service: A Mini-Symposium—Where Do We Go From Here?* 13 J. OF AC. LIBRARIANSHIP 282 (1987).

Users of Internet information may have similar low expectations of accuracy. They identify as existing problems lack of technical standards, complex or unknown procedures, insufficient or uneven network capacity, unreliability of data transmission and transformations, insufficient connectivity, technological

ritt's analysis; mere dissemination is not sufficient to establish the prerequisite content control that allows tort liability to attach.<sup>33</sup>

#### IV. INTELLECTUAL PROPERTY CONSIDERATIONS

This Section focuses upon the issues identified in the Introduction that follow from the potential of data dissemination to infringe upon the intellectual property rights of the original data provider and/or the compiler. The WLI database has three components; each consists of distinct pieces of intellectual property. At the core of the database are the official gazettes from the participating nations. The second component is an aggregation of the first—the compilation of the gazettes into a single database. Finally, layered on top of the database are the abstracts and indexes prepared by the Library and its partners.

Under United States law, the Library could not claim copyright in any of the three components.<sup>34</sup> However, under United States law, a private contractor may obtain copyright protection for the core index and abstract database, taken as a whole.<sup>35</sup> Re-

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overkill, data security, inadequate education and training, inadequate documentation and directories, and poor or inappropriate network management. See Charles R. McClure, *Networked Information Resources: Developing Academic Services from a User Perspective*, presented to The Coalition for Networked Information 5-6 (March 19, 1991). They want networks to work as simply as their TVs with built in, simple directories so they are not buried in information. *Id.* at 6. They want information to be available for use according to their own work habits. *Id.* If information "costs," they want to buy it in only the small units they need. *Id.*

Electronic publishers, however, want to recoup for the availability of entire databases as well as the value of negative information in a highly volatile market. They want guarantees of copyright protection, especially as the traditional limits on copying have disappeared. They do not want compulsory licensing. Because of uncertainties in the marketplace, they rely on contracts to protect their rights. Libraries, users, and publishers all want a simplified, quick and easy permission and payment system. See Karen Hunter, Notes for Harvard Conference on Proposed EC Directive (1992) (unpublished manuscript on file with the *Villanova Law Review*).

33. Perritt, *supra* note 11, at 103.

34. The 1976 Copyright Act expressly prohibits government agencies from claiming copyright in government works. 17 U.S.C. § 105 (1988).

Although the Library cannot claim copyright, it may be able to benefit from a transfer of a copyright from a hired contractor. For example, the Library has discussed with Harvard Law School forming a joint project for creating indexes and abstracts of foreign law. Under a carefully drawn co-publishing contract, the Library may be able to claim a copyright in the total value-added product. See Opinion of John Kominski, General Counsel, construing Trust Fund Bd. Act of 1988, 2 U.S.C. 162 (1990). A limitation on such a transfer is that a government agency cannot gain copyright if it substitutes a contractor to perform work basic to its own mission. See *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

35. 17 U.S.C. § 103(a)-(b) (extending copyright protection to compilations, but limiting protection to originality contributed by compiler).

viewing foreign language official gazettes, marking relevant entries for indexing, translation, and linking gazette and pointers would constitute more than the minimum necessary activities for copyright under United States law.<sup>36</sup>

Under the Berne Convention's national treatment, the gazettes, the database and the indexes and abstracts would be protected in signatory nations to the extent protected by that nation's laws.<sup>37</sup>

Confusion exists in the European Community, however, over whether such databases are protected subject matter under the Berne Convention. The United States has used the Uruguay Round discussions to clarify that compilation copyright in fact applies under Article 2(5) of the Berne Convention and that authorship standards extend to data. The so-called Dunkel TRIPS (Trade Related Aspects of Intellectual Property) provides:

Compilation of data or other material, whether in machine readable or other form, which by reason of selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection shall not extend to the data or materials itself, shall be without prejudice to any copyright subsisting in the data or material itself.<sup>38</sup>

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36. The United States Supreme Court has held that under Article I, § 8, cl. 8, of the United States Constitution, originality is prerequisite to copyright protection and that originality "remains the touchstone of copyright protection." *Feist Pub. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1288 (1991). As applied to compilations, the Court stated that copyright protection is available if the compilation "features an original selection or arrangement of facts, but the copyright is limited to that particular selection and arrangement." *Id.* at 1290. For a discussion by the Register of Copyrights of the post-*Feist* protection for databases, see Ralph Oman, *Reflections on the Changing Shape of Database Protection* 20 (1992) (unpublished manuscript on file with the *Villanova Law Review*).

37. Convention for the Protection of Literary and Artistic Works, Article, Sept. 9, 1886 as amended 1979, cited in S. REP. No. 352, 100th Cong., 2d Sess. 1, 2 (1988).

Article 5 [of the Berne Convention] sets out the fundamental principles on which the Convention is based: national treatment; automatic protection; and the independence of copyright protection as between the country of origin of a work and the other countries of the Union. It assures, first of all, to protected works national treatment; that is, works which originate in a Berne Union country obtain in all other Berne Union countries the same protection as the latter give to works of their own nationals as well as the rights specially granted by the Convention. Letter of Submittal to the President from the Secretary of State, June 4, 1986, reprinted in EXEC. REP. No. 17, 100th Cong., 2d Sess. 1, 6 (1988). For a complete discussion of the major provisions of the Berne Convention, see HARRY G. HENN, *HENN ON COPYRIGHT LAW* 425-28 (3d ed. 1991).

38. Wendell Willkie II, General Counsel of the U.S. Department of Com-

A proposed European Community Directive would harmonize existing European law; under its terms the core data would be unprotected, but a compiler could gain ten year *sui generis* protection.<sup>39</sup> Under the Proposed Directive, the uncopyrightable gazettes would be unprotected.<sup>40</sup> By harmonizing European law, the Directive would encourage increased investment in databases; such investment is thought to be necessary because the European Community is playing catchup to the United States in this sector.<sup>41</sup> Under the Proposed Directive, the author would gain ten year *sui generis* database protection for such a particularly enumerated non-commercial database.<sup>42</sup>

Although neither the Library nor its partners plan to scan, index or abstract United States or Western European law because commercial and government-sponsored full text databases are already widely available in accessible languages, the commercial sector on the two continents is likely to be the principal customer for expedited document delivery by E-mail or fax. An incentive exists to be able to exploit one's own data; the Library will be limited to cost recovery under its proposed Fund legislation, but other entities may see a commercial value in this market. The unsettled issue then is whether such suppliers can claim fair use in copyrighted portions of the database. If they can, they effectively ride free on the work of others. If they cannot, does this not violate the public policy of favoring the provision of information to the public?

Under existing law, the United States and other countries respect each other's copyright regimes.<sup>43</sup> There should be no danger that copyrighted Western European government information would enter the public domain in the United States or that the Library can claim copyright in Europe. The waters become muddier, however, under the Proposed Directive.

One commentator has argued that traditional copyright is

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merce to Honorable Carlos Moorhead, Subcommittee on Intellectual Property and Judicial Administration, July 10, 1992, at 2. The TRIPS text would provide protection for even uncopyrighted works.

39. Proposed Directive, *supra* note 8, Art. 9-3, at 72 (providing database creator with ten year protection against unfair extraction).

40. *Id.* at 61 (stating that copyrights of author are unaffected by incorporation of work into database).

41. *Id.*, Explanatory Memorandum, § 1.1, at 2.

42. For a discussion of the provisions of Article 5 of the Berne Convention, see *supra* note 37.

43. For a discussion of the Berne Convention provisions incorporating this agreement, see *supra* note 37.

not sufficient for encyclopedic databases in which comprehensiveness is the *raison d'être*.<sup>44</sup> To paraphrase his example, suppose a database vendor wished to use uncopyrighted government information in ILIN as the basis of a CD-ROM product on Islamic personal status law utilizing another's software. The vendor requires protection for his or her expensive CD-ROM product, yet, the vendor may not be able to obtain copyright protection because his or her works lack the constitutionally required originality.<sup>45</sup>

Under the Proposed Directive in Europe, however, the vendor may be able to qualify for copyright and prevent others from infringing on his "mode of compilation." Understanding that "1) [i]n principle, the intellectual creation we purport to protect is the mode of compilation of a database, and 2) . . . this mode of compilation will often not be worthy of copyright protection," copyright should exist for the duration of the database against the unauthorized transmission, distribution, reproduction of and *access* to his database, which would include all types of downloading, storing, printing and *displaying* of its contents, be it in *their entirety or in part*.<sup>46</sup> The compiler, therefore, favors the Proposed Directive, which has been loudly criticized.

I have observed that reaction against the proposal has been particularly vehement among common law countries, especially the United States, United Kingdom and Ireland, which liberally protect databases.<sup>47</sup> Among criticisms of the Directive are: (1) it adds two further levels of protection, which may be separately held, to the three already present in some member states;<sup>48</sup> (2) the reciprocity requirements for makers of databases who must be nationals of, habitually reside in, or be incorporated in the European Community are too complex;<sup>49</sup> (3) it is inevitable, despite representations to the contrary, that copyright and other rights in

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44. George Metaxes, *Protection of Databases: Quietly Steering in the Wrong Direction?*, 7 EIPR 227 (1990).

45. See generally Jane Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 343 (1992) (discussing protection available to compilations of facts).

46. Metaxes, *supra* note 44, at 228.

47. See Law Library of Congress, *Copyright in Government Publications in Various Countries* (June, 1992) (copy on file with the *Villanova Law Review*).

48. Clifford Chance & Christopher Millard, *Comments on the Proposed EC Database Directive*, 6 W. INTELL. PROP. 76 (1992) (discussing components of Proposed Directive).

49. "It is likely, for example, that many databases of U.S. origin would be protected by the new database copyright but not by the new unfair extraction right because their authors qualify for protection but their makers do not." *Id.* at 77.

material contained in the database would be destroyed;<sup>50</sup> (4) authors are unable to have "any rights to do or authorize acts which are protected by any underlying copyrights in the contents;"<sup>51</sup> (5) it fails to take into account the complex interaction between copyright in a database and in its underlying contents;<sup>52</sup> (6) the compulsory licensing requirement where the information is not otherwise available is unworkable;<sup>53</sup> (7) it promotes forum shopping;<sup>54</sup> (8) it fails to recognize that a series of insubstantial changes over time may result in a different unprotected database after ten years;<sup>55</sup> (9) it lacks a *sui generis* solution for issues resolved by the Berne Convention such as authorship, protection duration and scope; (10) the ten-year duration is too short, it does not provide incentives to database development and falls short of international norms;<sup>56</sup> (11) it fails to define "substantial" in a database context;<sup>57</sup> and (12) it creates the likelihood that the *sui generis* protection will overtake copyright and in the process introduce uncertainty into intellectual property law.<sup>58</sup>

The United States information industry, the world's largest, has protested the Proposed Directive and its application to United States companies:

This thinly veiled challenge to the United States to enact legislation changing the contours of protection for databases under U.S. law has further roiled the waters already troubled by the fallout of the *Feist* case. . . .

. . . .

In the wake of *Feist*, for instance, many database proprietors have revised their licensing agreements to incorporate into them contract restrictions, on use which previously might have been handled as a matter of copyright. This new stress on contract could undermine the growing trend toward ubiquitous, spontaneous information access through telecommunication networks without the need for written contracts. An acceleration of this trend because of heightened uncertainty about the

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 78.

55. *Id.*

56. Oman, *supra* note 36, at 13.

57. *Id.*

58. *Id.*

contours of copyright protection would hardly serve the best interests of information users.<sup>59</sup>

Another disturbing trend is to "enshrine in federal law a purported right of state governments to restrict access to these critical materials to those who can pay "reasonable fees for services incidental to making [them] public."<sup>60</sup> The information industry fears that this shift in information policy may lead to federal government attempts to copyright print or electronic information.

The European Association of Information Services is equally "concerned about the introduction of a new and untested *sui generis* right."<sup>61</sup> They dislike the European protectionism in the tone of the proposal because their members must compete in the international marketplace. Ambiguity in definitions and relationship to Berne are other concerns.

Register of Copyrights, Ralph Oman, believes the Proposed Directive's "right against unfair extraction" deserves careful attention in the United States because of the power of the European Community to influence global harmonization and because it offers protection for investments in uncopyrightable databases equivalent to the foreign "sweat of the brow."<sup>62</sup> If the United States legislated along the lines of the Proposed Directive, the Library would be able to protect its databases by complying with reciprocity requirements. Such a proposal would be exceedingly controversial.

## V. CONCLUSION

Despite the remoteness of potential liability of the Law Library of Congress, its employees and its partners in activities relating to the dissemination of foreign law databases and attendant products, discussion of potential problem areas should focus attention on the balancing of public policy concerns against an unsettled legal and commercial marketplace in which the United States may be unable to protect the workproduct of its own employees. While federal information policy favors free dissemina-

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59. Statement of S. Metalitz before the Subcomm. on Intellectual Property and Judicial Administration, United States House of Representatives, May 14, 1992, at 11-13.

60. *Id.*

61. EUSIDIC response to the Proposed Directive, accompanying letter of Barry Mason, Executive Director, to author, Nov. 30, 1992 (copy on file with the *Villanova Law Review*).

62. Oman, *supra* note 36, at 14.



tion of government information, that information is a national resource to be exploited in the international marketplace, either through trade with other governments for access to similar databases, licensing to commercial vendors, or individual expedited document delivery to law firms and other institutions.

The actual issue here is not legal but economic. Participants in ILIN need access to useable international legal information in the performance of their governmental mission. Government subsidies for creation of that information are drying up: the commercial sector is interested only in the repackaging of commercially viable databases and expects to get the underlying information free from the government. Government information providers need a cross subsidy to create databases carrying the "unprofitable" legal information supporting the legislative and administrative process, especially that from the developing countries that are increasingly becoming the world's "hot spots." That information can not be created on demand. We have not even begun, for example, to estimate the amount of Arabic legal information to be digitized, translated, indexed and abstracted. We know that the Law Library of Congress cannot keep up with it alone: its Near Eastern division long ago abandoned the shoeboxes of index cards that provided non-Arabic speakers access to this information. Electronic scanning of official gazettes over the Internet, coupled with cooperative international indexing and abstracting, allows governments simultaneous access to information crucial to decisionmaking. Legal, economic and policy regimes should coalesce to facilitate this process without playing havoc with traditional legal concepts.